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Definition of Relevant Market in the Sea Transport Sector

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TABLE OF CONTENTS

Abbreviations

CFI	European Court of First Instance
CMLR	Common Market Law Report
EEC	European Economic Community
EC	European Community/Treaty Establishing the European Community
ECSC	European Coal and Steel Community
ECJ	European Court of Justice
ECR	European Court Reports
HMT	Hypothetical Monopolists Test
OFT	Office of Fair Trading
OJ	Official Journal of the European Communities
SSNIP	Small but Significant Non-transitory Increase in Price
TAA	Trans Atlantic Agreement
TACA	Trans Atlantic Conference Agreement
VSA	Vessel Sharing Agreement

1. Introduction

1.1. The Issue of Market Definition

Fair competition is an overriding goal of the European Community[1]. According to Article 3(g) of the EC Treaty[2], the activities of the Community must include *"...a system ensuring that competition in the internal market is not distorted"*.
In order to achieve that goal, the Commission of the European Communities[3] investigates undertakings[4] that it suspects are acting in a way that distorts competition within the internal market. Such action might be for example abuse of dominant position which is prohibited by Article 82 EC. However, in order to determine whether the undertaking under scrutiny is abusing its dominant position the Commission must first establish that the undertaking does in fact hold a dominant position on the market in which it acts. In order to do so the Commission must define the undertaking's relevant market. Defining the relevant market is therefore the first step towards determining whether an undertaking has distorted competition in the internal market.

Defining relevant markets is an intricate and difficult task. One must furthermore define each market on a case by case basis. It is therefore not possible to use former market definitions made by the European Court of Justice (ECJ) or the Court of First Instance (CFI) as precedence even if they were acknowledged, at the time, as valid in the ECJ or CFI judgments. However, they can of course serve as guidance for future definitions.

What makes relevant market definition so interesting is just this; the fact that markets change with the ups and downs of the economy and the fact that there is a bit of insecurity as to how the Commission and the EC Courts will define the relevant market in the next case.

What makes market definition even more interesting is trying to apply it to the sea transport sector. This is a market that is very old and that has to comply with some very large changes to its sector in recent years. These changes make it difficult for the undertakings in the sea transport sector to know how to define the market they act in. It must be done however and that is the reason why market definition in the sea transport sector is of such importance and interest.

1.2. Background

The Commission White Paper, *European transport policy for 2010: time to decide*,[5] explains that with the help of the *Marco Polo programme*[6] billions of tonnes kilometres will shift from land transport services to sea transport services making transport in the Community more environmentally sound. The shifting consists of tens of per cent of tonnes kilometres which will naturally increase the frequency and thus importance of sea transport. I believe that along with this increase in sea borne trade will follow an increased amount of cases before the ECJ

[1] Hereinafter also referred to as the EC or the Community
[2] Consolidated Version of the Treaty Establishing the European Community of 24 December 2002, OJ C 325/33
[3] Hereinafter referred to as the Commission
[4] As regards the definition of an undertaking see Craig, Paul & de Búrca, Gráinne, *EU Law, Text, Cases and Materials*, Oxford University Press, 4th edition, 2008, p. 1006 and 952-953
[5] COM/2001/0370 final, Brussels, 12 September 2001
[6] Regulation (EC) No 1382/2003 of the European Parliament and of the Council of 22 July 2003 on the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo Programme), [2003] OJ L 196 p.1

and the CFI with regard to shipping and competition. Since there is not much case law[7] on Article 82 and even less on market definition as regards the sea transport sector I find that there is an acute need for an analysis with regard to this area.

1.3. Purpose

The purpose of this thesis is to define the relevant market in the sea transport sector. The two main questions that I seek to answer in this thesis are the following: 1) how is the relevant market in the sea transport sector defined in EC competition law? and 2) what must shipping companies take into consideration when defining it?

1.4. Limitation

This thesis is about Community competition law and sea transport. I will view and assess the sea transport sector through the eyes of Article 82 EC. In this assessment focus will lie with the definition of relevant market. The thesis encompasses both relevant product market definition and relevant geographic market definition.

There will be no assessment of dominance, abuse of dominant position or of potential impact on interstate trade.

1.5. Method and Material

The EC Treaty was renumbered due to the Treaty of Amsterdam of 1 May 1999. For example, Article 82 EC was formerly known as Article 86 EEC. I will use the new numbering system in relation to all cases and all other materials written prior to and subsequent to 1 May 1999 alike. When quoting a text that uses the old numbering system and that gives reference to an article in the EEC Treaty I will replace the article's number for the current one, putting the new one within brackets: "Article [82]".

In order to process the sources of law that form the basis for this thesis I have used a traditional legal method. The sources of law that above all are used in this thesis are EC legislation, EC case law, Commission Decisions and academic commentary.

The lack of case law[8] on relevant market definition as regards the sea transport sector is a problem that I have addressed by, first of all, examining and presenting the case law that is central to relevant market definition in general, second, by examining and presenting the case law that is central to relevant market definition in the transport sector but especially within the sea transport sector, and thirdly, by supplementing the case law with arguments and conclusions from other legal sources as well with my own arguments and conclusions.

The case law and the Commission Decisions referred to in this thesis are what have made Article 82 EC and relevant market definition come alive and is therefore inherent in these two legal bodies. To keep it separate from the legislative, regulatory and academic discussion on relevant market definition would, I feel, impair a full understanding of the subject. I have therefore not treated the case law and the Commission Decisions separately. In Chapter 5 I focus on and analyse certain cases and decisions applicable to the sea transport sector but the

[7] 'Case law' in this paragraph also includes Commission decisions
[8] 'Case law' in this paragraph also includes Commission decisions

chapter does not (and is not intended to) offer the reader an overview of all the case law and all the decisions that are central to the subject of this thesis.

1.6. Disposition

The study is divided into six chapters. The second chapter offers the reader an introduction to the concept of competition. The third chapter serves as an introduction to EC competition law with focus on Article 82 EC. The fourth chapter treats relevant market definition. It gives an insight to how the relevant market has been defined in ECJ and CFI case law and how this market has been assessed by the Commission. It also presents a non-exhaustive list of factors that may be taken into consideration when defining the relevant market. Thereafter, in chapter five, I will discuss how the relevant market may be defined in the sea transport sector. The discussion is both analytical as well as speculative. The study ends with conclusions in chapter six.

2. Competition

Competition is a relationship of economic action and reaction and it exists therefore where an undertaking's economic action triggers a similar economic reaction by another undertaking. For example, competition exists between two undertakings if the first undertaking lowers its prices and the second undertaking thereby feels obligated to also lower its prices. This feeling of obligation must however be based on an economic evaluation by the second undertaking of how its consumers will respond to the first undertakings price cut. Competition could also exist even if the action triggers a *dissimilar* reaction by the other undertaking. However, that reaction would in that case at least have to be taken within the same economic environment in order for competition to exist between the two companies. Let's say that the first undertaking produces pencils and decides to lowers prices on this product. The second undertaking, which is also a producer of pencils, does however not lower its prices on pencils. Instead it includes a pencil sharpener in the price of each pencil. If the first undertaking's action does not trigger a similar reaction or a dissimilar reaction within the same economic environment then competition cannot be said to exist between the two undertakings.

It is obvious that competition between undertakings is beneficial for its consumers. They enjoy for example lowered prices due to the competition. But competition is also beneficial for the undertakings themselves in that it encourages them to get better and more efficient. In order to gain competitive leverage undertakings have to, for example, better their products and sometimes invent new competitive products.

3. EC Competition Law

3.1. Historical background

European competition law is based on the old American anti-trust rules such as the Sherman Act from 1890,[9] which is still in force[10]. In fact, USA forced post war[11] Germany to adopt American style competition rules; it was a requirement for returning full sovereignty to the leaders of the new Germany.[12] This was about the same time as the signing of the Rome Treaty of 1958.[13]

There were actually no 'European' competition rules before the creation of the ECSC in 1951. With the Rome Treaty of 1958 on the European Economic Community (EEC) came an extended set of competition rules that however were not enforced by the Community institutions until 1962.[14]

3.2. Article 82 EC and Regulation 139/2004

A central provision in EC competition law is Article 82 EC which this thesis will be based on. Article 82 includes two essential criteria: 1) an undertaking whose mere presence on the market weakens competition on that market and 2) a conduct of that undertaking which disables the continuance of the level of competition existing on the market or which at least disables the growth of that level of competition. The former is the position of dominance of the undertaking and the latter is the abuse of that dominance. It is not until the undertaking abuses its dominant position that Article 82 can be invoked against said undertaking.

Article 82 of the EC Treaty states the following:
"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.[…]"

Article 82 EC thus lists five criteria which have to be established before the prohibition in the article applies: (a) one or more undertakings; (b) dominant position; (c) within the common market or in a substantial part of it; (d) an abuse; (e) an effect on interstate trade.[15]

Article 2(3) of Regulation 139/2004[16] states that:
"A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

Thus, in order to conclude whether the company or the contract that the company has concluded impedes effective competition on the common market or in a substantial part of it, it is necessary firstly to assess the relevant market for that company.

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[9] Compare especially Article 81 and 82 EC with §1 and §2 in the Sherman Antitrust Act (15 USC § 1, 2).
[10] http://www.usdoj.gov/
[11] World War II
[12] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.36
[13] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.36
[14] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.36
[15] See also Power, Vincent, *EC Shipping Law*, Informa Pub, 2nd edition, 1998, p.283
[16] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 024, 29/01/2004 p.0001-0022

A common requisite to both Article 82 of the EC Treaty and Council Regulation (EC) 139/2004 (commonly known as the EC Merger Regulation) is that of dominant position. It thus needs to be assessed whether the company under investigation holds a dominant position or not. The Court of Justice has defined dominant position as *"[…] a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers."*[17] According to Bellamy & Child[18] the assessment of an undertaking's dominant position essentially involves three inter-related stages, namely market definition, market share analysis and analysis of competitive constraints.

The use of Article 82 and the Merger Regulation thus requires an assessment of the relevant market for the company under investigation. This is because these provisions all include requisites as regards the common market. Thus, in order to be able to conclude whether any of the provisions in these regulations have been violated it is firstly necessary to assess the relevant market for the company under investigation.

3.3. The Concept of Relevant Market in EC Competition Law

3.3.1. The Commission's Notice on how to Define the Relevant Market

The Commission Notice on the definition of relevant market for the purposes of Community competition law was published in October 1997 and was well met as a progressive and realistic approach to the subject of relevant market definition.[19] The purpose of the Notice is to increase transparency and assist undertakings and its advisors by making public the procedures that the Commission follows and the criteria and evidence that it relies on in relevant market definition.[20]

The Notice is 'soft law', not legislation,[21] and is without prejudice to interpretation by the ECJ or the CFI.[22] Its definition of the relevant market is in fact based on the case law of the Community Courts.[23]

The Commission, in the 1st paragraph of the Notice,[24] states the following:
"The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community

[17] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207, paragraph 65. See also Case 322/81, *Michelin v Commission*, [1983] ECR 3461, paragraph 30
[18] Bellamy, Sir Christopher & Child, Graham, *European Community Law of Competition*, Sweet & Maxwell, 5th edition, 2001, p.685
[19] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.63
[20] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 4 and 5
[21] Since it is neither primary nor secondary legislation (that is neither treaty nor regulation, directive, decision, recommendation or opinion).
[22] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 6
[23] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 9
[24] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 1

competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89 […]"[25]

In *Continental Can* the European Court of Justice gave an indication of the importance of establishing the relevant market in a case concerning abuse of dominant position. In the words of the Court, the definition of the relevant market is of essential significance to the determination of whether or not an undertaking is dominant.[26]

As is evident from reading Article 82 EC, being a dominant undertaking on a market within the European Community is in itself not a breach of Article 82 EC; the dominant undertaking must also have abused its dominant position in a way that may affect trade between member states. When reading Article 82 EC it becomes evident firstly that whether an abuse is at hand is what one seeks to establish *after* establishing that the undertaking is dominant. It also becomes evident that in order to establish that the undertaking is dominant one must first establish in which market the undertaking acts, that is, the relevant market.

In the Commission Notice on the definition of relevant market for the purposes of Community competition law,[27] (hereinafter the Commission Notice or the Notice) the Commission states the following:
"The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance […]"

Thus, defining the relevant market fills at least two purposes. As for the relevant *product* market it serves partly in assessing which other products that are part of the same relevant product market as the product of the undertaking under scrutiny. As for the relevant *geographic* market it serves in assessing which other undertakings which act within the same relevant geographic market as the undertaking under scrutiny. As for the relevant market in general it serves in simplifying the calculation of the undertakings' market shares, which is of significance in a subsequent dominance assessment.

According to the Commission Notice, the relevant market consists of a relevant geographical market and a relevant product market and services are included in the concept of 'product'.[28] The Commission has been criticized over the years for making to narrow relevant market definitions;[29] all to the detriment of the concerned undertakings since the larger the geographic market the less risk for the undertaking of being considered dominant.

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[25] Council Regulation (EEC) No 4064/89 was the so-called 'Merger Regulation' at the time of publication of the Notice. It has now been substantially amended by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 024, 29/01/2004 p.0001-0022
[26] Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215, paragraph 32
[27] C372 09/12/1997, p.0005-0013, paragraph 2
[28] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 7, with reference to 'Regulations based on Articles 85 and 86 of the Treaty'
[29] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.352

3.3.2. Relevant Product Market

The concept of relevant product market is purely economic. Also, when defining the relevant product market only economic factors are considered.

According to Power,[30] it is clear from Community judgments that interchangeability is the essential element when defining the relevant product market. Interchangeability can somewhat roughly be explained as a measurement of possible demand substitution but also possible supply substitution. Interchangeability can thus exist on the demand side as well as the supply side. The adopted expressions are: supply-side substitution or supply-side interchangeability and demand-side substitution or demand-side interchangeability.

Korah[31] says that the relevant product market is defined by substitutes on both the demand-sides and the supply-sides of the market. By this she means that both consumers and producers affect the definition of the relevant product market at a given time.[32] Furthermore, the previous was clearly stated by the ECJ in *Continental Can*[33] where, according to Korah,[34] the Court said that the Commission's finding (namely that Continental Can was dominant) was inaccurate since the Commission had only focused on the demand-side and not at all taken into consideration possible substitutes on the supply-side of the market; that is whether any producer of cylindrical light metal cans could switch production to the more complex shapes that Continental Can was making. It is of course highly important to establish if an increase in price by Continental Can would lead other producers of light metal cans to switch production and in that way take part of Continental Can's market share and thereby, in that regard, be part of the same relevant product market.

We have thus established that there are two sides to relevant product market definition: demand and supply. To further my arguments in this matter I will now elaborate on the two parts separately, starting with the demand-side.

Interchangeability is an economic term depicting a situation where a certain product, in the eyes of the consumer, can be interchanged with another. The ECJ stated for example in *Ahmed Saeed*[35] that the test to employ is whether a certain service can be distinguished from any possible alternatives based on a comparison of specific characteristics. If it can, it is thus not interchangeable with those alternatives and can therefore only to an insignificant degree be affected by competition from them.

Interchangeability is often measured in cross-elasticity. This is also a purely economic tool. Cross-elasticity is high if an increase in price will lead consumers to switch in significant numbers from one product, for example oranges, to apples or pears. If consumers do switch to other products then cross-elasticity exists, which means that oranges, apples and pears may in

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[30] Power, Vincent, *EC Shipping Law*, 1998, Informa Pub, 2nd edition, p.285
[31] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, p.107
[32] It should be remembered in connection to this that relevant market definition is not abstract but rather something that needs to be done at every specific occasion.
[33] Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215, paragraph 33
[34] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, p.107
[35] Case 66/86, *Ahmed Saeed*, [1989] ECR 803, paragraph 40

reality be part of the same product market. In fact, in that case, oranges, apples and pears might well form their own *relevant* product market.

Thus, when defining the relevant product market one tries to find out how likely it is that consumers of a certain product will switch from one product to another due to an increase in price of the first product. This test is also called the SSNIP-test[36] and is employed by as well the Commission as by the Community Courts.

As regards the supply-side part of relevant product market definition, Jones and Sufrin state that if a manufacturer of a certain product can easily switch production to another product then both products may be in the same market. [37] The Commission puts forth an example concerning paper to explain the same:
"*Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume."*[38]

In conclusion, supply-side substitution thus occurs when a producer of a certain product switches production facilities to produce another type of product and thereby renders any attempted price increase of that product unprofitable. For example: Company A produces and sells yellow widgets and dominate that market. Company B produces and sells green widgets but since consumers seem more apt to buying yellow widgets Company B decides to switch production facilities to produce yellow widgets instead. In order to keep Company B out of the yellow widget market, Company A raises prices on its yellow widgets. If such an increase proves unprofitable, supply-side substitution exists between the yellow widgets from the two companies. In essence: B's widgets are in that case perfect substitutes for A's widgets.[39]

Supply-side substitution can thus exist on a product market as seen above; that is, interchangeability might be high between the widgets from Company A and the widgets from Company B. But supply-side substitution can also exist on a geographic level; that is, as regards the product's geographic market. Let's say for instance that Company A is based in France and Company B is based in Germany. If substitutability exists and is high enough then both France and Germany might be parts of the same relevant geographic market. I will examine relevant geographic market definition in more detail below.

[36] More on the SSNIP-test below in sub-section 3.4.3.
[37] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.79
[38] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 22
[39] Cf. example in Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.60

3.3.3. Relevant Geographic Market

As regards the relevant geographic market definition, the case law of the ECJ indicates that it comprises all areas in which the conditions of competition are sufficiently homogeneous: In *United Brands*, for example, the ECJ stated that *"The opportunities for competition under Article [82] of the treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated."*[40] The mentioned geographic area was later in the judgment held to be *"[…] an area where the objective conditions of competition applying to the product in question must be the same for all traders."*[41]

The CFI held in *Deutsche Bahn*[42] that *"[…] the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market […]"*.

The relevant geographic market can thus be larger or smaller than the area in which the concerned undertaking acts depending on similarities or differences in the conditions of competition.[43]

Jones & Sufrin mention that although the Court[44] has stressed the need for sufficiently homogeneous conditions of competition this requirement is mentioned but not stressed in the Commission's Notice on market definition. They go on saying that the Commission appears to recognize that the behaviour of undertakings on a certain market may be constrained by competing undertakings' imports from markets where different conditions of competition apply.[45] Korah continues by saying that it is hoped that this indicates that the Commission may ignore this requirement unless these imports prove ineffective on competition.[46]

Interstate trade would, it seems to me, benefit from an approach by the Commission that imports may affect the market position of Community-based undertakings, that is, that the requirement of homogeneous conditions of competition should not be upheld unless imports do not affect the conduct of the undertakings in question.

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[40] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207, paragraph 11

[41] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207, paragraph 44

[42] Case T-229/94, *Deutsche Bahn AG v. Commission* [1997] ECR II-1689, paragraph 92. See also Case T-168/01, *GlaxoSmithKline Unlimited v Commission*, ECR II-02969, paragraph 152

[43] Wetter, C., Karlsson, J., Rislund, O. och Östman, M., *Konkurrensrätt – en handbok*, Thomson Fakta, 3rd edition, 2004, p.124

[44] It is not clear what Jones & Sufrin mean by 'the Court', but given the context in which it is mentioned it seems to refer to both the ECJ and the CFI.

[45] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.383, with reference to Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 8th edition, 2004.

[46] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 8th edition, 2004, p. 112

For there to be an infringement of Article 82 EC there has to be an abuse committed on a relevant market that comprises at least a substantial part of the common market. Such a market can be geographically huge – for instance France or Germany – but it can also be very small. In *Porto di Genova*,[47] the port of Genoa in Italy was said to constitute a substantial part of the common market.

As mentioned before (immediately before sub-section 3.3.2.), the Commission has been accused of making too narrow definitions of the relevant market and especially in Article 82 cases.[48] Perhaps in the future we will see the Commission make broader definitions. After all market integration continues to be predominant within the EU and more and more Member States adhere to the Community. This might be a factor that will affect future relevant market definitions.

Since the Community Courts has no jurisdiction over issues of substance that the parties have not brought before the court[49],[50] it is highly important for the undertaking under scrutiny (the complainant) to try and prove that the market is so wide as to convince the court that the undertaking is not in a dominant position.

3.3.4. The SSNIP-test

The SSNIP-test can in short be described as a test with which one tries to identify short term demand substitutability by positing a small but significant price rise.[51] 'SSNIP' stands for 'small but significant non-transitory increase in price' and it is sometimes called the 'hypothetical monopolists test' (HMT). The test[52] is in reality a theoretical experiment of thought, a hypothesis. One simply tries to figure out what the effects of a hypothetical increase in price of a certain product would be among consumers of the product. In the example above I talked about how one tries to establish whether interchangeability exists or not and with the SSNIP-test one applies the same method but within a set frame of a 5-10 per cent[53] short term price rise which, however, must be perceived to be permanent.[54]

The test is included and elaborated on in the Commission Notice[55] but not referred to as 'the SSNIP-test' or even as 'the hypothetical monopolists test'. The Commission describes the way it uses the test in delineating the relevant product market with the following paragraphs:
"15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can

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[47] Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, [1990] ECR I-5889
[48] See *infra*, p.14 with reference to Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.66
[49] Court of First Instance or the European Court of Justice
[50] Article 230 EC
[51] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.77
[52] R. J. Van den Bergh and P. D Camesasca, *European Competition Law and Economics: A Comparative Perspective*, Sweet & Maxwell, 2nd edition, 2006, p.131 say that *"The so-called SSNIP test is not a test but a conceptual framework, within which several quantitative tests can be employed to address the market delineation question"*
[53] 5-10 per cent relative increase; that is, it should be put in relation to prices on other competing products; see Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 17
[54] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, p.490
[55] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013

be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.
16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.
17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. […]"
"18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand."[56]

According to Jones & Sufrin, the SSNIP-test has had great success in that it has served as a more economically rigorous approach than the previous 'qualitative' and less scientific approach. It has thereby enhanced the chance of more realistic market delineation. They say that previously to the SSNIP-test Community market definitions tended to be arbitrary and narrow, at least regarding non-merger cases. However, there is a downside to the test: Imagine for example that the prevailing price that is to be raised in the test already is at a monopoly level. Jones & Sufrin depicts this problem as the main problem with the SSNIP-test. The downside is obvious when conducting an Article 82 examination of a suspected dominant undertaking in that the price rise probably will not have an effect that truthfully mirrors consumer behaviour.[57]

3.3.5. Temporal Market

The Commission does not refer to the temporal market in its Notice which might be because the temporal market is usually considered as an inherent part of the product market.[58] In the case *European Night Services v. Commission*,[59] which was tried by the CFI around the time of

[56] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraphs 15-18
[57] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.66 and 363-364
[58] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.63
[59] Case T-374, 375, 384 and 388/94, *European Night Services v. Commission*, [1998] ECR II-3141

the making of the Commission Notice, the CFI annulled the Commission's decision under Article 81 EC regarding a joint venture. The Commission then appealed to the ECJ, and in its appeal argued for a confinement of business transport markets to early mornings and late evenings as opposed to being an all round the clock market. The ECJ never tried the case but the fact that the Commission argued for a temporal market in the rail transport business market is still of value to practising jurists (especially to those working in the (rail) transport sector) with regard to their future market definitions.

In *United Brands*[60] there was evidence that the demand for bananas fluctuated depending on the season. The Commission however disregarded these findings. The ECJ never took a stand in the issue.

There is little written in EC competition law literature about temporal market definition. However, Jones & Sufrin raise the issue of the temporal market being of importance to the definition of relevant markets in the transport sector. Power,[61] however, says that the temporal market is rarely relevant in EC competition law with regard to shipping and limits the use of temporal market within shipping to markets such as summer or winter cruising and commercial ice-breaking. Stopford,[62] on the other hand, does not agree entirely with Power. Stopford is namely of the opinion that seasonality does occur on many liner routes as cargo volume shifts up and down during the year.

[60] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207
[61] Power, Vincent, *An Overview of EC Competition Law as it Relates to the Shipping and Port Sectors*, European Maritime Law Organisation Spring Seminar *(EU Maritime Law – A Baltic Perspective on the Changes Ahead)*, Gdansk, Poland, May, 2006, paragraph 23
[62] Stopford, Martin, *Maritime Economics*, Routledge, 2nd edition, 1997, p.343

4. Definition of Relevant Market in EC Competition Law

4.1. Introduction

The relevant market consists of two different markets; the product market and the geographic market. The first step in establishing the actual competition is to define the product market. The Commission states the following concerning product markets and geographic markets in its Notice[63] concerning relevant market definition:
"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[64]
"The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area."[65]

A definition of the relevant market has to be made on a case to case basis.[66] This means that no matter how clear, precise or even abundant the case law and Commission decisions are and no matter if the facts of a previous case or decision are identical with the facts of the current case, one cannot take for granted that the outcome in the current case will be the same as the one in the previous case. Some of the reasons for this are that 1) demand and supply are not constants, 2) the economy and what constitutes an economy fluctuates and 3) undertakings' market influence change over time as do consumer preferences.

However, even though no correlations can be made between market definitions due to the need for case by case based assessment of relevant markets there actually seem to be one common denominator as regards how the relevant markets are defined. As regards mergers they tend to be anticipatory while assessments under Article 82 EC tend to be retrospective. Even so, when defining the relevant markets the assessments will be based on the same criteria both in merger cases as in Article 82 cases.[67]

So what we are dealing with here is a common instrument for defining the relevant markets and this instrument is described by the Commission in its Notice[68].

4.2. Relevant Product Market Definition - Factors

4.2.1. Demand-Side Substitution

Demand-side substitution occurs when consumers stop buying one product and start buying another product due to a relative change in price of the products. Substitutability between the

[63] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013
[64] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 7
[65] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 8
[66] Case T-125 and 127/97, *Coca-Cola v Commission*, [2000] ECR II-1733, paragraphs 82, 92 and 93
[67] Goyder, D. G., *EC Competition Law*, Oxford University Press, 4th edition, 2003, p. 278
[68] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013

products exists when the consumers can buy sufficient amounts of the other product so as to make the price change of the first product economically unsustainable in the long run.[69]

According to the Commission Notice,[70] consumers' perception of the substitutability of products is the most important factor when trying to define the relevant product market. The other two competitive constraints, supply-side substitutability and potential competition, are thus of less immediate importance as regards the assessment of the relevant product market and shall according to the Commission be a secondary source in such an evaluation.[71]

In the case of sea transport we are dealing with services and not products. Although services are to be treated the same way as products according to the Commission Notice[72] we face an altogether different situation when discussing (sea transport) services.[73]

4.2.1.1. Chain substitutability

The relevant market does not only include direct substitutes but also indirect substitutes. Chain substitutability is when two products or geographic areas[74] are not directly interchangeable but are respectively substitutable with a third product or area.

For a practical example concerning the relevant product market; imagine two undertakings where undertaking 'C' produces pills containing Vitamin C and undertaking 'E' produces pills containing Vitamin E. Furthermore, imagine a third undertaking, undertaking 'C & E', which produces pills containing both Vitamin C and E. The pill containing vitamin C may not be directly substitutable with the pill containing vitamin E. They may however both be substitutable with the pill containing both vitamin C and E.

4.2.2. Supply-Side Substitution

A hypothetical monopolist undertaking (undertaking A) that wishes to raise prices may be hindered not only – as we have seen above – by the demand-side of the market, but also by the supply-side of the market. If undertaking A raises its prices, undertaking B – which does not currently supply an interchangeable product – may compete with undertaking A by switching production. If this is done at short notice[75] and without significant cost or risk and has the effect of preventing undertaking A from profitably sustaining a price raise of 5 to 10 per cent above the competitive level, then supply-side substitution has occurred.[76] Since this form of substitution is carried out by suppliers it is called supply-side substitution.

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[69] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2008

[70] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013

[71] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 13 and 14

[72] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 7, with reference to 'regulations based on Articles 85 and 86 of the Treaty'

[73] See below in Chapter 5

[74] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 57

[75] It has to be done in less then one year. See Office of Fair Trading (OFT), *Market definition – Understanding competition law*, December 2004

[76] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 20

A hypothetical example with reference to the sea transport sector could be that of a monopolist shipping company – company X – that supplies a liner trade between Göteborg and Rotterdam and raises the price for this service by 5-10 %. Let's also say that this price raise is enough to attract other shipping companies that currently do not supply a substitutable service on the same trade. It might be for example a shipping company that provides tramp services in the Mediterranean – company Y. If company Y finds the Göteborg–Rotterdam liner trade market attractive enough to switch its supply of services to offer a liner trade between Göteborg and Rotterdam and manages to do this in less than one year without significant switching costs or risks, then the Göteborg–Rotterdam liner trade market is no longer worth monopolizing for company X.

4.2.3. Potential Competition

As opposed to supply-side substitution, potential competition is used to describe a situation where a producer can switch production to another product that competes with the product of the investigated undertaking but not in the short term and not without significant investment. Potential competition is therefore not a factor taken into consideration when defining a relevant market but is however of importance when assessing market power.[77]

4.3. Relevant Geographic Market Definition - Factors

4.3.1. Introduction

According to Jones & Sufrin[78] the size of the geographic market area will depend, in general, especially on the relation between transport costs and the value of the product transported. Diamonds will typically have a larger geographic market than scrap iron since diamonds are so much more valuable than scrap iron.

As regards the demand-side perspective of relevant geographic market definition, the relevant factors are according to the Commission, among others, national preferences, the need for a local presence, language, life style and culture.[79] These factors are enumerated by the Commission to offer guidance,[80] and are not binding in any way. The Notice as a whole is according to its opening paragraph only of guiding relevance but is all the same based on extensive community case law concerning relevant market definition,[81] and should therefore be afforded certain weight and dignity. If the circumstances are such as to make the enumerated factors relevant then the Notice should definitely be applied.

Supply-side factors are less important when defining the relevant market. The Commission however states that the possibilities for transport and distribution that the seller dispose of are perhaps the clearest obstacle for a customer to divert its orders to other areas.[82] My interpretation is that the possibilities for transport and distribution are decisive for the

[77] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.79
[78] *EC Competition Law*, Oxford University Press, 3rd edition, 2008, p.383
[79] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 46
[80] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 1
[81] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 9
[82] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 50

assessment of the relevant geographic market. One must, in my meaning, therefore draw the conclusion that supply-side substitutability is of larger relevance in the assessment of the geographic market than of the product market. One can therefore establish, conclusively, that according to the Commission the most important factors for the assessment of the relevant geographic market are the consumer's situation and the producer's transport and distribution possibilities.

Both the distribution of market shares between the investigated undertaking and its competitors as well as pricing and price differences (see sub-sections 4.3.2 and 4.3.3. below) are factors that the Commission takes an initial look at to roughly determine the size of the relevant market. These factors are used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.[83]

Wetter and others mention with reference to the Commission Notice paragraph 28-29 that no conclusions can be drawn solely based on the findings of an examination of these initial factors simply since any differences found not necessarily are due to the geographic areas being different relevant geographic markets.[84]

4.3.2. Distribution of Market Shares and Area of Sufficiently Homogeneous Conditions of Competition

The case law of the ECJ provides that the relevant geographic market comprises all areas in which the conditions of competition are similar or sufficiently homogeneous and that by 'geographic area' is meant an area where the objective conditions of competition applying to the product in question are the same for all traders.[85]

According to Fine, the Commission has stated that an undertaking that hold widely varying market shares in different countries is evidence of a lack of homogeneity in competitive conditions.[86] What Fine means is that if an undertaking has a market share of 40% in France but only 5% in Germany this might be evidence of differing competitive conditions between the two states. However, he also states that evidence showing that the market shares of an undertaking varies from Member State to Member State may be outweighed by other evidence indicating that the territory concerned is not immune to competition, even if the variations in market shares are significant.[87] Such evidence may for example be evidence of

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[83] Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 28

[84] Wetter, C., Karlsson, J., Rislund, O. och Östman, M., *Konkurrensrätt – en handbok*, Thomson Fakta, 3rd edition, 2004, p.130

[85] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207, paragraph 11 and 44

[86] Fine, Frank L., *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC*, Graham and Trotman Limited, 2nd edition, 1994, p.200, with reference to paragraph 16a (author's not.) in the 91/403/EEC: Commission Decision of 29 May 1991 declaring the compatibility of a concentration with the common market (Case No IV/M.043 *Magneti Marelli/CEAc*) - Council Regulation (EEC) No 4064/89, OJ 1991 L 222 p.38

[87] Fine, Frank L., *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC*, Graham and Trotman Limited, 2nd edition, 1994, p.200, with reference to paragraph 15 (author's not.) in the Commission Decision of 23 September 1991 declaring a concentration to be compatible with the common market (Case No IV/M.134 - *Mannesmann/Boge*) according to Council Regulation (EEC) No 4064/89, OJ 1991 C 265 p.0000 and paragraph 33 et seq. (author's not.) in the Commission Decision of 24 February 1992 declaring a concentration to be compatible with the common market (Case No IV/M.166 - *Torras/Sarrio*) according to Council Regulation (EEC) No 4064/89 OJ 1992 C 058 p.0000

market penetration.[88] To this end it should be mentioned, also, that the Commission seemingly recognizes that the competition on a certain relevant market may be constrained by imports from areas where the conditions of competition are not the same.[89]

4.3.3. Pricing and Price Differences

According to the Commission, the ability for undertakings to charge different prices for the same product in different Member States is an indication of uneven conditions of competition.[90] E contrario, relatively uniform price levels throughout the EC suggests that the relevant geographic market is the EC.[91] Bishop and Walker[92] do not entirely agree to these statements made by the Commission. They feel that prices do not need to be at exactly the same level since demand substitutability is dependant on the willingness of the consumers[93] to switch to buying other products. The geographic market should on the contrary be defined as the market where one finds a similarity of price movements instead of a similarity of price levels.[94] It seems however that the Commission has altered its view with the publication of the Commission Notice and now bases its relevant geographic market definitions on substitution arising from changes in relative prices.[95]

4.3.4. Demand Characteristics

Since the evaluation of market shares and prices is only an initial working hypothesis it must therefore be checked against an analysis of demand characteristics.[96] Such demand characteristics are for example importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, etc. According to the Commission Notice, the nature of demand for the relevant product may in itself determine the scope of the geographical market. That is why it is important to continue the work of defining the relevant *geographic* market by looking at the demand characteristics for the relevant *products*. The Commission goes on by saying that factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

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[88] Commission Decision of 18 December 1991 declaring a concentration to be compatible with the common market (Case No IV/M.121 - *Ingersoll-Rand/Dresser*) according to Council Regulation (EEC) No 4064/89, OJ 1992 C086 p.0000, paragraph 14. See also paragraph 41 in *Tetra Pak I* - 88/501/EEC: Commission Decision of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 - *Tetra Pak I (BTG licence)*) OJ 1988 L 272 p.27

[89] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, sub-section 4.3.1.2., p.111-112

[90] Commission Decision of 23 September 1991, No IV/M.043 *Magneti Marelli/CEAc*, paragraph 16a.

[91] See e.g. paragraph 12 in *ICI/Tioxide* – Commission Decision of 28.11.1990 declaring a concentration to be compatible with the common market (Case No IV/M.0023 - *ICI/TIOXIDE*) according to Council Regulation (EEC) No 4064/89, OJ 1990 C 304 p.000

[92] Bishop, Simon, Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 2nd edition, 2002

[93] That is, consumers *at the margin* (author's not.)

[94] Bishop, Simon, Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 2nd edition, 2002, p.115

[95] Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 29

[96] Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 29

4.3.5. Barriers to Trade

In the Preamble to the EU Treaty[97] is stated that the parties to the Treaty are resolved to continue the process of creating an ever closer union among the peoples of Europe. In the Preamble to the EC Treaty[98] is stated that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition. These objectives, market integration and fair competition, are threatened by different barriers to entry such as for example laws relating to maximum prices; for instance regarding prices on pharmaceutical products.[99] Entry barriers such as price rises may prevent new undertakings from entering a profitable market on a sufficient scale.[100]

There are many examples from EC case law showing that legal regulations may cause barriers that creates national geographic markets. General Motors and British Leyland, for example, were each found to have monopolies awarded through legislation in the form of type-approval certificates that consumers needed in certain situations.[101] In the Commission Decision *British Midland v. Aer Lingus*,[102] the state regulatory measure granting exclusive access to airport slots was found to be a barrier to entry. However, defining the relevant geographical market as confined within national borders may be due to totally different factors. In *Nestlé/Perrier*,[103] for instance, the relevant geographical market was defined as France, primarily based on the fact that French consumers remained extremely loyal to local products. Narrow markets can also be caused by high transport costs; more on that in the next sub-section.

Barriers to trade are divided into regulatory and actual barriers. Regulatory barriers are obstacles provided by law or government policy such as for example quotas and tariffs. An actual barrier is, for example, the cost for creating a distribution network or the need for a local presence so that you can sell your products in a given area.[104]

There is much talk in literature as well as in EC case law about 'Barriers to Entry'. My view after having studied the subject of barriers in general is that Barriers to Entry is a subcategory of Barriers to Trade. They may be regulatory or actual or even behavioural[105]. I conclude that barriers to entry and trade are neither opposites nor exactly the same and that the name Barrier to Entry is used to describe a barrier to trade that hinders undertakings from entering a

[97] Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community of 29 December 2006, OJ C321E

[98] Consolidated Version of the Treaty Establishing the European Community of 24 December 2002, OJ C325/33

[99] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, p.17

[100] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, 9th edition, 2007, p.19

[101] Case 26/75, *General Motors Continental NV v Commission of the European Communities*, [1975] ECR 01367 and Case 226/84, *British Leyland Public Limited Company v Commission of the European Communities*, [1986] ECR 03263

[102] 92/213/EEC: Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, *British Midland v. Aer Lingus*) OJ 1992 L096 p. 34, paragraphs 19 and 20

[103] 92/553/EEC: Commission Decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190 - *Nestlé/Perrier*) OJ 1992 L356 p.1, paragraphs 21, 22, 34, 60 and 81

[104] Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 30

[105] In my view it is behavioural in the sense that they are due to the actions of undertakings already on the market. Such actions are for example predatory pricing, sunk costs etc. See for example Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.89 and 91

national market. For goods with high relative transport costs the geographic market is limited to within national borders. In this sense, the transport costs become, de facto, barriers to entry. Transport costs are by some referred to as an entry barrier[106] and by some as a trade barrier[107]. I will refer to it only as a barrier to trade.

In *Atlantic Container Line AB*[108] the CFI concluded that the service contracts of the Trans-Atlantic Conference Agreement (TACA) which fixed the rates for transatlantic maritime transport services and the remuneration of freight forwarders in certain circumstances constituted a barrier to entry among potential competitors.

The CFI found in *Van den Bergh Foods Ltd v Commission*,[109] that Van den Bergh Foods' requirement in the form of an exclusivity clause stating that only ice cream from Van den Bergh Foods was to be stocked in the freezer cabinets provided (and still owned) by Van den Bergh Foods to the retailers was in conflict with Article 82 EC.[110]

Jones & Sufrin suggest however that along with the progress of the internal market, barriers to entry will be further reduced and markets may broaden and maybe even become EU-wide at length.[111]

4.3.6. Trade Flows and Transport Costs

The pattern and evolution of trade flows is used to offer supplementary information as to the economic importance of demand and supply factors. The cost of transport is important in the analysis of these trade flows. When examining trade flows and transport costs the Commission also tries to determine to what extent trade flows and transport costs may create actual barriers to trade, thus resulting in different geographical areas.[112]

According to Jones & Sufrin,[113] the size of the geographic market will depend on several different factors, but especially transport. Where the transported product's value is high in relation to the cost of transporting it, the geographic market tends to be wider. Conversely, where the value of the product transported is low in relation to the cost of the transport, the geographic market tends to be narrow. Therefore, relatively high transport costs can create national markets.

Jones & Sufrin continue by saying that narrow geographic markets have been defined in cases involving the transport sector. In fact, they say, in such cases the geographic markets and product markets may in effect be the same.[114] In *Sealink/B&I Holyhead: Interim Measures*,[115]

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[106] For example Fine, Frank L., *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC*, Graham and Trotman Limited, 2nd edition, 1994, p.195

[107] For example the Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 31

[108] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraphs 1031-1036

[109] Case T-65/98, *Van den Berghs Foods Ltd v Commission,* [2003] ECR II-04653

[110] Case T-65/98, *Van den Berghs Foods Ltd v Commission,* [2003] ECR II-04653, paragraph 171

[111] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.384

[112] Commission Notice on the definition of relevant market for the purposes of competition law, C372 09/12/1997, p. 0005-0013, paragraph 31

[113] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.383

[114] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.384

the Commission defined as a separate market the ferry route between Holyhead and Dun Laoghaire. In the same decision the Commission also distinguished three different corridors between Great Britain and Ireland; the northern, southern and central corridor. Regarding the central corridor the Commission even concluded that the Holyhead route was a market separate from the Liverpool route. The delineation and separation of the Holyhead and Liverpool routes as different geographical markets was later upheld in *Sea Containers v. Stena Sealink - Interim measures*.[116]

[115] Commission Decision IV/34/174 of 11 June 1992, *Sealink/B&I Holyhead: Interim Measures*, [1992] 5 CMLR 255. See also, in reference to *Sealink/B&I Holyhead: Interim Measures*, Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.384

[116] 94/19/EC: Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - *Sea Containers v. Stena Sealink - Interim measures*) OJ 1994 L 015 p.8, paragraphs 12, 13, 61 and 63

5. Definition of Relevant Market in EC Competition Law with Regard to the Sea Transport Sector[117]

5.1. Introduction

All of EU law and therefore also EU competition law applies in principle to the maritime sector.[118] However, although the Treaty establishing the European Economic Community[119] was signed on 25 March 1957, Europe had to wait until 1986 for some serious EC shipping law to be evolved.

The Council of Ministers adopted four Regulations on 22 December 1986 which lay down the foundations for most of future shipping law within the European Community. Two of these were Regulation 4055[120] and Regulation 4056[121]. Regulation 4055 gave birth to the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. Regulation 4056 laid down detailed rules for the application of Articles 81 and 82 EC (former Articles 85 and 86 EEC) to maritime transport in providing a block exemption for the sea transport sector. The block exemptions have been repealed and will no longer apply to the se transport sector as of October 2008.

Legal practitioners working for shipping companies must assess their companies' position on the market. This assessment must be done continuously since the market changes continuously. In order to assess the shipping company's position on the market the legal practitioner must therefore first define the boundaries of the shipping company's market. Is this done in the same way as for other companies? No it is not. Not entirely. In general, it seems to me, one can conclude that the definition is made in the same way as regards different undertakings that offer transport services, that is, where the undertaking provides a service and where that service consists of transporting goods or passengers. It is true that the service of transporting goods and the service of transporting passengers are separate markets but that does not matter. The procedure of defining the relevant market is the same for both services. There are however special nuances to consider when defining relevant markets in the sea transport sector. These will be examined below.

5.2. The Market for Services

5.2.1. Introductory Notes

The market for services comprises all the services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.[122] Stability of demand for a particular service is therefore a relevant criterion for defining a relevant market and this entails that the mere fact that

[117] In this chapter, focus lies with services and not products. Thus, reference will be made to *relevant market for services* or *relevant service market* instead of relevant product market.
[118] Case 167/73, *Commission v France*, [1974] ECR 359, paragraph 32
[119] Now the 'European Community'
[120] Council Regulation (EEC) N° 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. [1986] OJ L 378 p.1
[121] Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. [1986] OJ L 378 p. 4 (hereinafter Regulation 4056)
[122] Case 322/81, *Michelin v Commission*, [1983] ECR 3461, paragraph 37

different services are, to a limited extent, interchangeable does not preclude that they belong to separate service markets.[123]

When defining the relevant market for services one must first define the services which, although not substitutable for other services, are sufficiently interchangeable with the services of the undertaking under scrutiny. Whether they are sufficiently interchangeable is regarded in terms of their objective characteristics as well as in terms of competitive conditions and the structure of supply and demand on the market.[124]

It should in regard to demand characteristics also be mentioned what Stopford[125] concludes are the main factors in consumer demands. He has in *Maritime Economics* observed the maritime transport sector from a purely economic and industrial perspective and his conclusions are based if not only then to great extent on statistics. Stopford says that different consumers direct their demands to different actors within the shipping business due to differences in consumer demand. Some need to transport oil and some need to transport cars. Some need to transport various items of various sizes and therefore need a shipping company that carries containers. Stopford says that these needs may involve many different factors but there are four main factors that form the basis of consumer preferences: a) price, b) speed, c) reliability and d) safety.[126]

In the following it will be examined how the ECJ, the CFI and the Commission have defined the relevant service market with a view to settling cases on competition within the transport sector.

5.2.2. Atlantic Container Line AB v Commission

The substance of the case *Atlantic Container Line AB*[127] was whether the Commission was right in its decision when saying that the TACA liner conference had induced a competing shipping line to join TACA. The applicants (among others, Atlantic Container Line AB of Göteborg, Sweden) claimed in their appeal that the Commission had not rightly defined the relevant market for services.[128] The Commission concluded in its decision that the relevant market for sea-transport services was the market for containerised liner shipping between ports in northern Europe and ports in the United States and Canada.[129] The applicants objected to the Commission's assessment of both the demand-side and the supply-side of the relevant market for services.[130]

The applicants argued firstly that the definition of the relevant market for services had been wrongly based on the concept of one-way substitutability and that according to generally

[123] Case C-333/94, *Tetra Pak v Commission*, [1996] ECR I-5951, paragraphs 13-15
[124] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 91
[125] Stopford, Martin, *Maritime Economics*, Routledge, 2nd edition, 1997
[126] Stopford, Martin, *Maritime Economics*, Routledge, 2nd edition, 1997, p.10-11
[127] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275
[128] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 759 and 781. They also objected to the definition of the relevant geographic market but that part will be treated in sub-section 5.2.1.1. below
[129] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - *Trans-Atlantic Conference Agreement*) OJ 1999 L 95 p. 1, paragraph 84
[130] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 781

accepted economic principles, substitutability requires a two-way relationship.[131] The basis for this argument was that the Commission had found that containerised transport was substitutable for break bulk shipping but not vice versa. The Commission said that as the degree of containerisation increases, shippers of non-containerised cargoes turn towards containerised services and that once those shippers become accustomed to shipping in containers they no longer turn to non-containerised shipping.

In effect, the Commission had reasoned on substitutability and came to the conclusion that there is not enough substitutability but rather just a one-way substitutability[132] consisting in the shifting of markets or rather the emergence of a new market (containerised shipping) to the detriment of an old one (break bulk shipping) that entails a possible substitution of container transport for non-containerised transport.[133] The CFI supported the Commission's findings in this question.[134] Noteworthy is also the fact that the Commission came to a similar conclusion in the *Maersk/PONL*[135] decision but in that case regarding reefer containers and bulk reefer vessels.[136]

Secondly, the applicants contended that there are cases of substitution between containerised and non-containerised transport on the eastbound transatlantic trade.[137] The Commission did however find that the cases referred to by the applicants were scarce.[138] As mentioned above (in the beginning of section 5.1.), even though two services may be interchangeable they are still parts of separate markets if the degree of interchangeability is marginal. Consequently, the CFI quashed the objections of the applicants on this point.[139]

The applicants also supplied data showing that certain cargoes, such as fertilisers and certain iron and steel products, are carried by both bulk carriers and container carriers. This proved, according to the applicants, that shippers switch their cargoes between containerised and non-containerised transport. The CFI rightly concluded however, that, in this context, it is not important that certain cargoes can be switched between both modes of transport. What is important for determining the possibility of demand substitutability is whether the choice of mode (non-containerised or containerised) is made on the basis of the characteristics of the mode. The CFI agreed that shippers do switch cargoes between the two modes of transport but contended, firstly, that steel products are diverse and of differing value and, secondly, that shippers have certain delivery requirements[140] which means that shippers transport some steel

[131] One-way substitutability is when blodgets are substitutable for widgets but not vice versa.
[132] More on one-way substitutability below
[133] See also the reasoning to this effect in Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p.1603, section 14.95
[134] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 767 and 790-795
[135] Commission Decision of 29 July 2005 declaring a concentration to be compatible with the common market (Case No IV/M.3829 – *MAERSK/PONL*) according to Council Regulation (EEC) No 4064/89 (Not yet published in the Official Journal)
[136] Commission Decision of 29 July 2005 declaring a concentration to be compatible with the common market (Case No IV/M.3829 – *MAERSK/PONL*) according to Council Regulation (EEC) No 4064/89 (Not yet published in the Official Journal), paragraph 13
[137] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 769
[138] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 769 and 803
[139] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 804-805
[140] See also, in regard to consumer delivery requirements, Stopford's reasoning in sub-section 5.1.2. immediately below

products by bulk and others by container. Thus, the applicants' data did not serve as evidence of the two modes being substitutable.[141]

5.2.3. Atlantic Container Line v Commission (the TAA-case)[142]

The substance of the *TAA*-case is the TAA-conference's action for annulment of the *TAA* decision[143]. The Commission had decided that certain provisions of the Trans-Atlantic Agreement infringed Article [81(1)] of the Treaty. The Commission refused to grant an exemption to those provisions under Article [81(3)] of the Treaty.

What makes the *TAA*-case interesting for this thesis is that it covered Article 1(3) of Regulation 4056[144] which contains requisites that, as will be shown immediately below, may be of importance to both demand and supply substitutability in the sea transport sector.

As seen above, in chapters 3 and 4, the Commission takes into consideration a great deal of factors when defining the relevant market; among others demand characteristics. Faull & Nikpay, state that the requirements defining tramp vessel services and liner conferences listed in Article 1(3)(a)[145] and Article 1(3)(b)[146] of Regulation 4056 were given legal consequences by the CFI judgement in the *TAA*-case.[147] Since Article 1(3) appears to be legally binding, and I concur with Faull & Nikpay that it must be, the requirements listed therein are of great importance and value to a shipping company since they may be of guidance for shipping company jurists in their assessment of the shipping company's position on the market.

The requisites in Article 1(3)(a) regarding tramp vessel services are the following:
- transport of goods in bulk or in break-bulk
- in a vessel chartered wholly or partly
- voyage or time charter or any other form of contract
- party to the charter is one or more shippers
- non-regularly scheduled or non-advertised sailings
- freight rates are freely negotiated case by case

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[141] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 806

[142] N.B.: This is not the same case as the one treated in 5.1.1. Case T-395/94, *Atlantic Container Line v Commission*, [2002] ECR II-875. It will hereinafter be referred to as the *TAA*-case in order to avoid confusion in regard to Case T-191 and 212 to 214/98, *Atlantic Container Line AB v Commission*

[143] Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 – *Tran-Atlantic Agreement*) OJ 1994 L 376 p.1

[144] Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. [1986] OJ L 378 p. 4

[145] Article 1(3)(a) reads: "'tramp vessel services' means the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand."

[146] Article 1(3)(b) reads: "'liner conference' means a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services."

[147] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p.1615, section 14.128 with reference to Case T-395/94, *Atlantic Container Line v Commission*, [2002] ECR II-875, paragraph 143

We thus have four elements to consider when assessing our shipping company's position on the market:[148]

1) category of goods transported (particular categories; e.g. ore, cereals, oils, etc. shipped in bulk or break-bulk)
2) nature of the service (port to port maritime transport)
3) operational characteristics (transport on demand; non-scheduled sailings; type of contract)
4) commercial terms (freely negotiated freight rates; freight rates negotiated on a case by case basis)

The requisites listed in Article 1(3)(b) regarding liner conferences are the following:

- two or more vessel-operating carriers
- which provide international liner services
- for the carriage of cargo
- on a particular route or routes within specified geographical limits and
- the carriers have an agreement or arrangement (whatever its nature)
- the carriers operate within the framework of this agreement or arrangement
- under uniform or common freight rates
- and any other agreed conditions with respect to the provision of liner services

As regards liner shipping I thus conclude, by comparison with what Faull & Nikpay have concluded on tramp services immediately above, that from the definition of liner conferences can be isolated the same four elements (but with slight alterations as regards their inherent meaning) to consider when assessing a shipping company's position on the market:[149]

1) category of goods transported (mostly container-sized cargo but also goods that are too big for containers such as e.g. prefabricated building materials)
2) nature of the service (maritime transport between named ports)
3) operational characteristics (scheduled sailings on liner trade whether filled or not; type of contract (usually just bill of lading))
4) commercial terms (obligation to accept cargo from all interested shippers; freely negotiated freight rates; freight rates negotiated on a case by case basis)

Finally, in regard to the above, Stopford[150] also lists certain demand characteristics to liner shipping that he thus concludes are of importance to the consumer of liner services:

1) Freight cost
2) Frequency of sailings
3) Transit time door-to-door[151]
4) Reliability of time-keeping
5) Reliability of administration
6) Space availability

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[148] As regards the listing of the four elements, see: Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p.1615, section 14.128. For certain specifics regarding the elements, see: Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 – *Tran-Atlantic Agreement*) OJ 1994 L 376 p.1, paragraph 34

[149] See also Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 – *Tran-Atlantic Agreement*) OJ 1994 L 376 p.1, paragraph 34. For certain specifics regarding the elements, see: Fayle, C. Ernest, *A Short History of the World's Shipping Industry*, London, George Allen & Unwin, 1st edition, 1933, p.253

[150] Stopford, Martin, *Maritime Economics*, Routledge, 2nd edition, 1997, p.362

[151] According to Stopford, air transport can be a significant competitor to liner services when high-value products are to be transported on long routes since sea transport may take weeks.

It is hard to say to what extent the Commission will rely on these characteristics in a case of suspected dominance of a liner shipping company or a liner conference. To this end Stopford mentions, that different shippers have different preferences and therefore do not value the characteristics listed above in the same way.[152] However, since the Commission does take demand characteristics into consideration and since the characteristics listed by Stopford are based on consumer demand statistics there is good reason for practising jurists in the liner shipping business to take these characteristics into consideration when assessing a shipping company's position on the market.[153]

5.3. The geographical scope of the relevant market for services

5.3.1. Atlantic Container Line AB v Commission

In *Atlantic Container Line AB v Commission*, except for the notion of one-way substitutability there was one more notion that seemingly confused the applicants: the geographical scope of the market for services.

The geographical scope of the service market must be kept separate from the geographic market; they are not the same. The notion of a geographical scope within the definition of the relevant market for sea transport services is quite logical since there is a clear geographic component inherent in the service concept. The sea transport is after all carried out between a point of origin and a point of destination. Faull & Nikpay,[154] argue for the existence of such a concept by saying that it is generally needed in order to make possible a decision on whether the concerned service is substitutable for another service.

But can it not be argued that the definition of the geographical scope within the service market is in effect a definition of the geographic market? No it cannot; at least not when it comes to liner shipping. Even though it may seem that such an argument could be valid it becomes rather clear that one must keep the two notions separate when considering the following:[155] Firstly, the Commission has applied a trade lane analysis which has led to the geographic scope of the market for services as being defined as the points of origin and destination.[156] The services are carried out between these two points. Secondly, although the geographic market may be defined as the trade itself (that is, the route between these two points) the Commission has acknowledged that there is sometimes an imbalance in, for example, the characteristics of the products shipped in the two directions,[157] which, in my view, must entail the definition of the geographical scope of the market for services as being the actual point of origin and the actual point of destination of the direction of the route that is

[152] Stopford, Martin, *Maritime Economics*, Routledge, 2nd edition, 1997, p.363
[153] Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 29
[154] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007
[155] N.B.: The following applies to liner shipping
[156] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p. 1602, section 14.95
[157] Commission Decision of 29 July 2005 declaring a concentration to be compatible with the common market (Case No IV/M.3829 – *MAERSK/PONL*) according to Council Regulation (EEC) No 4064/89 (Not yet published in the Official Journal), paragraph 15. See also Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p.1603, section 14.95

defined as the relevant market for services.[158] Furthermore, the trade in one direction might still affect the catchment area of the point of origin,[159] or even both the point of origin and destination.[160] Therefore, it is not hard to see why the relevant geographic market may sometimes be defined as not only the trade itself but also the catchment area of the two points between which the trade is set, whereas the geographical scope of the service market is merely the points of actual origin and actual destination for that direction of the trade.

As regards the geographical scope of the market for services in the case at hand, the applicants argued that the European ports of the Mediterranean were substitutable for the Northern European ports in regard to transport services on the transatlantic line.[161] The Commission, later supported by the CFI, however refuted these arguments saying that the inadequacy of the European ports of the Mediterranean is demonstrated by the fact that that the TACA parties (which were also VSA[162] parties) operated two to three round trip rail shuttles a week between Milan and Rotterdam.[163] The Commission further listed a few other factors that, together with the rail shuttle factor, brought the Commission to the conclusion – which was supported by the CFI on judgment – that the European ports of the Mediterranean were not substitutable for the northern European ports and thus, not a part of the relevant market for services in the case at hand.[164] The land transport service offered by TACA, that is, for example, the Milan–Rotterdam rail shuttle, was thus not concluded to be a part of the relevant market for maritime services even though it was a part of the intermodal transport service that TACA operated in Europe.[165]

The applicants tried to persuade the CFI that ports of southern Europe were interchangeable with ports of northern Europe regarding efficiency since, firstly, there was a study showing that these ports competed favourably with each other and, secondly, conferences have traditionally existed on the trade between southern Europe and the United States of America and, thirdly, independent undertakings such as Lykes and Evergreen have increased their

[158] As for my conclusion: What I mean is that if there is such an imbalance on a (two-way) route between, for example, the United States and northern Europe, then the two directions on that route may be considered as separate markets for services. The geographical component to the *relevant* service market (let's say that the relevant service market is the direction, Europe-U.S) will thus be 'Europe to U.S.' since the actual point of origin is Europe and the actual point of destination is the U.S. The relevant geographic market will, however, probably be defined as the points of origin and destination (for both directions) and their respective catchment areas. Naturally, there is nothing to preclude the geographical scope of the service market to coincide perfectly with the geographic market. Such a situation is possible. However, the two must be separated and are separated due to the fact that they are not assessed in the same way. Thus, it is the way one goes about defining them that separates them and not necessarily the outcome of the way of defining them.

[159] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 519

[160] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p.1603, section 14.95

[161] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 843 and 851

[162] "Vessel Sharing Agreement"

[163] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 859 and 880

[164] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - *Trans-Atlantic Conference Agreement*) OJ 1999 L 95 p. 1, paragraph 80-83 and Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 880

[165] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 884

services from southern European Mediterranean ports.[166] The CFI did not accept the applicants' arguments and, in my view, the CFI was absolutely right to do so with a view to defining the relevant market since what the applicants contested is more of interest to whether they are dominant on the market or not. Furthermore, I find the applicant's third argument to be quite weak since the supposed increase in the amount of services in southern European Mediterranean ports by Lykes and Evergreen does not necessarily come with a corresponding decrease in services from northern European ports. Moreover, what is interesting to know is not whether the regions compete favourably or not etc., but whether shippers that usually ship their cargo from the northern European ports will ship their cargo from the southern European Mediterranean ports after a lasting price raise of 5-10 per cent on the transatlantic services from the northern European ports.

5.4. The Geographic Market

5.4.1. Introductory Notes

Consistent case law shows that the geographic market may be defined as the territory in which the same or sufficiently homogeneous[167] conditions of competition apply to all concerned undertakings with regard specifically to the relevant products or services.[168]

In cases involving the transport sector, narrow geographic markets have been defined. In several cases the geographic market has even been confined as narrowly as consisting of the product market: In the following cases have been defined as separate markets 1) the air route between Dublin and Heathrow,[169] 2) the air route between Brussels and Luton,[170] and 3) the ferry route between Holyhead and Dun Laoghaire[171].

Are there any differences regarding relevant market definition as between undertakings? Yes. In my view there is at least one: transport costs. The cost of transport is an important factor, if not the most important one,[172] when defining the relevant geographic market except when defined with a view to assessing the position on the market of an undertaking that offer transport services. I assume that this is simply because the service is in effect the transport itself and the cost of transport is in effect the cost of the service itself. As said before (in section 4.3. above), Jones & Sufrin[173] state that the size of the geographic market area will depend especially on the relation between transport costs and the value of the product transported. Diamonds will therefore typically have a larger geographic market than iron ore. One can however not draw the conclusion that transport cost is not a factor in the definition of

[166] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 874
[167] It is not necessary for the conditions of competition to be perfectly homogeneous
[168] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 108. See also Case T-83/91, *Tetra Pak v Commission*, [1994] ECR II-755, paragraph 91, which was confirmed on appeal by judgment in Case C-333/94, *Tetra Pak v Commission (Tetra Pak II)*, [1996] ECR I-5951
[169] 92/213/EEC: Commission Decision of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, *British Midland v. Aer Lingus*) OJ 1992 L096 p. 34
[170] 88/589/EEC: Commission Decision of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/32.318, *London European - Sabena*) OJ 1988 L 317 p.47
[171] Commission Decision IV/34/174 of 11 June 1992, *Sealink/B&I Holyhead: Interim Measures*, [1992] 5 CMLR 255
[172] See the Commission Notice on the definition of relevant market for the purposes of Community competition law, C372 09/12/1997, p. 0005-0013, paragraph 50
[173] *EC Competition Law*, Oxford University Press, 3rd edition, 2008, p.383

the relevant geographic market in the transport sector. In my view, it should be treated as a part of the factor of price.

5.4.2. Atlantic Container Line AB v Commission

The applicants (among others, Atlantic Container Line AB of Göteborg, Sweden) claimed in their appeal to the CFI that the Commission had not rightly defined the relevant geographic market.[174] The Commission had concluded in its decision that the relevant geographic market consisted of the catchment areas of the ports in Northern Europe since that was where the maritime transport services were marketed.[175] The Commission had also reasoned upon a geographical scope within the relevant market for (sea transport) services.[176]

This reasoning (on the geographic component to the relevant service market) confused the applicants, making them believe that the Commission Decision was inconsistent regarding the definition of relevant geographic market. This confusion also had the effect that the applicants misunderstood the Commission's reasoning in paragraph 91 of the contested decision, where the Commission stated that the inland transport services which are part of the multimodal transport operation offered by TACA was not part of the relevant market for (maritime) services. The reason to why this was misunderstood was partly due to the fact that the Commission's definition of the relevant geographical market for inland transport services coincided with its definition of the relevant geographical market for the maritime services offered by TACA.

As seen above in 5.2.1., the Commission and ultimately the CFI did not regard the intermodal land transport service offered by the TACA parties as part of the geographical scope of the market for services and thus not a part of the service market at all. Moreover, neither the Commission nor the CFI treated the question of what possible effect the intermodal land transport service could have on *the geographic market*. It must, however, in my view, be concluded that the land transport service offered by TACA parties was a part of the relevant geographic market since the TACA parties' catchment area was found to be the area in which the TACA parties marketed their maritime services and that this area was commensurate with the scope of the TACA inland tariff.[177]

5.4.3. British Airways plc v Commission

What makes the case *British Airways plc v Commission* special is the fact that British Airways (BA) was placed under Commission scrutiny due to its suspected dominant position as a *buyer* of services. BA is of course a supplier of air transport services but it also purchases

[174] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 759 and 884

[175] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - *Trans-Atlantic Conference Agreement*) OJ 1999 L 95 p. 1, paragraph 519

[176] Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - *Trans-Atlantic Conference Agreement*) OJ 1999 L 95 p. 1, paragraph 76-83 and 84

[177] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275, paragraph 61-62, 884 and 887 and Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 - *Trans-Atlantic Conference Agreement*) OJ 1999 L 95 p. 1, paragraph 91 and 519

services from for example travel agents. The Commission stated that travel agents in the United Kingdom (UK) supplied a service to BA by selling tickets for BA flights.

The applicants (BA) contended that the relevant geographic market was broader than the United Kingdom.[178] The Commission claimed however that the relevant geographic market in this case was the territory of the United Kingdom, given the national dimension of travel agents' business.[179] The Commission based this finding on, among others, the following reasons:

- In the overwhelming majority of cases, travellers reserved their airline tickets in their country of residence[180]
- The distribution of airline tickets took place at a national level and airlines normally purchased the services for distributing those tickets on a national basis.[181]
- Airlines typically structure their commercial services at a national level.[182]
- British Airways was found to apply its performance reward schemes to all their UK travel agents in a uniform manner.[183]

The CFI supported the Commission's finding regarding the relevant geographic market.[184]

5.5. Conclusions for Shipping Companies

5.5.1. The Market for Services

As regards demand substitutability, it is required that jurists do not confuse substitutability with one-side substitutability. The consequences may be detrimental since it just might be the question of how to define the relevant market for services that ultimately leads to a finding of abuse of dominance. According to Faull & Nikpay, the principles outlined above regarding substitutability are likely to apply to cases regarding containerised cargoes as well as cases regarding non-containerised cargoes even though the Commission does not have much experience in that area.[185] Whether demand substitution is possible or not between different services depends, of course, to a great extent on consumer preferences.

5.5.2. The Geographical scope of the Relevant Market for Services

As seen above it is very important that, as a legal practitioner, one manages to separate the relevant geographic market from the geographic component to the market for services.

It cannot be argued that the definition of the geographical scope within the service market is in effect a definition of the geographic market when it comes to liner shipping. Even though

[178] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 75 and 83
[179] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 90
[180] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 109. British Airways argued that not all tickets sold by travel agents in the UK were necessarily sold to people living in the UK but could at the same time not give any account for how many tickets that were sold to people living outside the UK.
[181] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 111. The CFI took part of agreements that British Airways had signed with travel agents established in the United Kingdom that corroborated these findings.
[182] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 112
[183] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 113
[184] Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917, paragraph 116-117
[185] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, Oxford University Press, 2nd edition, 2007, p. 1603, section 14.96

the geographic scope of the market for services is defined by the Commission as the points of origin and destination on a certain trade lane and although the geographic market may be defined as the trade itself, the Commission has by acknowledging that there is sometimes an imbalance in, for example, the characteristics of the products shipped in the two directions also acknowledged that the the relevant geographic market is not defined in the same way as the geographic scope of the service market.

5.5.3. The Geographic Market

The geographic market is not defined in the same way as the geographical component to the market for services. We have thus learned from the *Atlantic Container Line* case[186] that the definition of the relevant geographic market is based on the definition of the relevant product market. As seen above, one cannot define the relevant product market based on the geographic scope of a certain service market. Even though TACA's inland transport service covered exactly the same area as the scope of the catchment area for the maritime services and thus was commensurate with the geographic market for the maritime service market one cannot draw the conclusion that the inland transport service and the maritime service was two parts of the same relevant market namely that of an intermodal service market.

I contested above that there is a significant difference between (maritime) transport services and other businesses as regards relevant market definition, namely transport costs. I based this conclusion on the fact that since the service offered by (maritime) transport companies is in effect the transport itself and since the cost of transport is in effect the cost of the service itself, transport costs cannot be said to be as important a factor to relevant market definition in the sea transport sector as within other business sectors. However, the cost of transport is still a factor to consider when defining the relevant geographic market for undertakings in the transport sector. In my view, it should however be treated as a part of the factor of price.

[186] Case T-191 and 212 to 214/98, *Atlantic Container Line AB and Others v Commission*, [2003] ECR II-03275

6. Conclusions

In this thesis has been examined the very basis of dominance assessment; the definition of relevant markets. The definition is made by investigation and assessment of not only consumer preferences but many other factors as well. It has however been established that characteristics on the demand-side of the market – such as consumer preferences as to price, speed, reliability and safety – are of great importance. I am of the opinion that these factors may even be more important in a definition of relevant market in the sea transport sector due to the weakened position of another otherwise very important factor, namely that of transport costs. As has been established, the cost of transport is pivotal to the definition of the geographic market but that cannot logically be the case were the transport is what the customer pays for. I have therefore come to the conclusion that transport costs should be assessed as a part of the factor of price in relevant market definition.

As regards the geographic market, the Commission has been accused of defining it arbitrarily and narrow. In my view it is hard to predict if these definitions will get wider in the future. The ever ongoing process of market integration and the extended number of Member States might affect this issue, but in what way? Many of the newer Member States are inferior economies and it is in the interest of all Member States to see to it that these economies flourish. Due to this interest, Community interstate trade should increase and the number of cases before the Community Courts should increase accordingly. I do not believe, however, that an increase in trade and the wider geographic range of the European Union (from Lisboa to Tallinn, Dublin to Athens and Sicily to Kiruna) due to its, as of 2007, 27 Member States will necessarily affect the Commission's opinion and the Community Courts' definition of the criterion "substantial part of the common market" in Article 82 EC. Furthermore, the definition of the relevant geographic market is based on the definition of the relevant service/product market. Therefore, it would be to go too far to say that just because the Community has grown geographically larger this would automatically induce the Commission and the Community Courts to make wider definitions of certain geographic markets.

Since the Community Courts, according to Article 230 EC, have no jurisdiction over issues of substance that the parties have not brought before the Court[187], it is highly important for the undertaking under scrutiny (the complainant) to try and prove that the market is so wide as to convince the court that the undertaking is not in a dominant position. Even the possible effect of imports from outside the European Community might be of evidentiary importance. The Commission seems to acknowledge a possible constraining effect by imports on undertakings within the Community. If the Commission in the process of future geographic market definitions finds that a competing undertaking's imports does affect the conduct of an undertaking that it is competing with, then the Commission should, in my view, eliminate the requirement of homogeneous conditions of competition in its geographic market definition since the only reason for upholding such a requirement is if the imports in question do not affect the conduct of the undertakings in question.

As regards evidence it must also be said that not only must an undertaking produce evidence to prove that the relevant market is, for example, larger than or different to what the Commission states, but also be aware that its own statements might serve as evidence to the detriment of the undertaking itself. Aer Lingus, for example, expressed in *Airline World* on 24

[187] The Court of First Instance or the European Court of Justice

April 1989[188] that they had established themselves as the dominant carrier on the routes between Dublin and London and that British Midland did not have the resources to offer a similar frequency. Such statements will not necessarily be seen as heavy proof of dominance but they hardly make it easier for the undertaking in question to argue that it is not dominant. In relation to this, Power[189] says that caution is recommended as to proclamations on one's own relevant market in for example annual reports. He says that such testimony is not decisive as to how the geographical market will be defined but it can be quite important.

As I concluded above in sub-section 4.3.1, the most important factors for the assessment of the relevant geographic market are the consumer's situation and the producer's transport and distribution possibilities. With regard to the sea transport sector, should the importance of transport and distribution possibilities be interpreted otherwise? I think not. Transport and distribution possibilities are supply-side factors and of relevance also in cases where a shipping company wishes to compete with another shipping company on a certain trade or market.

As for the consumer's situation, Jones & Sufrin[190] are of the opinion that if too much attention is placed on factors like, for example, consumer preferences the definition of the relevant market will be arbitrary and too subjective. Market definition should therefore be done mainly scientifically, with less reference to subjective factors as those recently enumerated which would lead to the Court not upholding controversial Commission Decisions such as in *United Brands*. Maybe Jones & Sufrin are right. I would however like to address this issue from a different angle and say that subjective factors such as consumer preferences must be included in relevant market definition simply because there is no market without buyers. Without consumers the concept of competition would not even exist.

I would like to sum up my thoughts, conclusions and theories that I have on relevant market definition with regard to the sea transport sector with the following: It is first of all extremely important that each shipping company has a market definition of their own. Secondly, make sure that your legal advisors keep this market definition up to date. For some shipping companies it may require an update as often as twice a year depending on the market. Every company should simply turn to its old annual reports and analyse whether the turnover typically fluctuates over a certain time period (a year or maybe a decade) and if so at steady rates. By doing so the time preferred for these market definition updates can be identified.

Furthermore, as a legal practitioner you should take as many of the factors mentioned in this thesis into consideration when defining your company's relevant market. Those are, for example, the ones listed in the Commission Notice, the ones listed by Stopford (see section 5.1, second last paragraph before sub-section 5.1.1.) and the ones listed in Article 1(3)(a) and (b) of Regulation 4056. In October of this year (2008) the Regulation 4056 is no longer valid. I am however convinced that the factors in Article 1(3) will still be of use as guidance to jurists in the shipping business. It must however be remembered that the quality of your market definition does not stand in direct relation to how many factors you have taken into consideration. You must also know how decisive the factors are in relation to each other. That

[188] See also Commission Decision 92/213/EEC of 26 February 1992 relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, *British Midland v. Aer Lingus*) OJ 1992 L096 p. 34, paragraph 7

[189] Power, Vincent, *An Overview of EC Competition Law as it Relates to the Shipping and Port Sectors*, European Maritime Law Organisation Spring Seminar *(EU Maritime Law – A Baltic Perspective on the Changes Ahead)*, Gdansk, Poland, May, 2006, paragraph 18

[190] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.62-63

is, you must assess which factors are of greater importance and which are of lesser importance to the definition of your company's relevant market.

Finally, I would like to offer the reader my thoughts on the accuracy of the Commission Notice as to definition of relevant markets in Article 82 cases. The Notice seems to focus more on mergers than on Article 82 cases in its opening paragraph. Jones & Sufrin say that the Commission may sometimes begin defining the relevant market in an Article 82 case with a predisposition to a finding of dominance which ultimately leads to a too narrow market definition.[191] Could it be that since the Notice is more focused on merger cases it is not perhaps a good enough tool to provide a basis for an accurate definition of relevant markets in Article 82 cases? Even if it is not, that does not in itself mean that the Commission is without other tools good enough to make an accurate definition of the relevant market in an Article 82 case. It is however of interest for undertakings and other actors on the market – such as jurists for example – to know what those other tools are and how the Commission uses them.

[191] Jones & Sufrin, *EC Competition Law*, Oxford University Press, 3rd edition, 2007, p.352 and connecting footnote

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